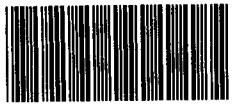


VA-56

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

RECEIVED

ALEXANDRIA DIVISION

MAY 17 1982

ENVIRONMENTAL DEFENSE FUND, INC., )  
CHESAPEAKE BAY FOUNDATION, INC., )

Plaintiffs, )

COMMONWEALTH OF VIRGINIA, ex rel. )  
STATE BOARD OF HEALTH )  
STATE HEALTH COMMISSIONER, )

Plaintiff Intervenor, )

v. )

JAMES LAMPHIER, )  
MRS. JAMES (JANET A.) LAMPHIER, )

Defendants. )

ATTORNEY GENERAL  
RICHMOND, VIRGINIA

ORIGINAL  
(Red)

CIVIL ACTION  
NO. 81-0948-A

RECEIVED

JUN 24 1982

AIR, TOXIC AND HAZARDOUS  
MATERIALS DIVISION  
EPA REGION III

MEMORANDUM OPINION AND ORDER

Plaintiffs, Environmental Defense Fund (EDF) and Chesapeake Bay Foundation (CBF) commenced this action pursuant to 42 U.S.C. §6972 of the Resource Conservation and Recovery Act (RCRA), which is the "citizen suit" provision of the Act. The Commonwealth of Virginia subsequently intervened as a plaintiff. EDF, CBF and the state ask for enforcement of Subtitle C of RCRA regarding the handling and management of hazardous wastes. The state also seeks injunctive relief under state law and for its response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601 et seq. During the trial, EDF and CBF dropped their claims for civil penalties, but seek counsel fees incurred under 42 U.S.C. §6972(e).

I

Defendants, James and Janet Lamphier, own and operate a waste collection and disposal business in Culpeper, Virginia, known as Jim's Liquid Waste. The business is located on land owned by the Lamphiers as tenants by the entirety. James Lamphier and his employees collected, stored and disposed of

sewage and industrial wastes. The industrial wastes are the subject of this action.

Records obtained from Lamphier's customers, local industries and VEPCO, indicated that the hauling of industrial waste began in 1974 and continued until early in 1980. During that time, 55 gallon drums were hauled by Lamphier's employees to the subject site. Most of the drums came from VEPCO's North Anna Power Plant construction site. Some of the wastes were disposed of, some of the drums were buried and some were placed in a storage shed.

In the Fall of 1979, Robert Foreman, of the State Board of Health, visited the Lamphier property. At that time he told Mrs. Lamphier that it was a disposal site. He advised her not to bring on additional wastes or bury excavation material. In December, the Virginia State Water Control Board and the State Department of Health ordered the Lamphiers to cease their disposal activities. The Lamphiers complied with this order but they did continue to haul wastes to the property for storage there.

In March, 1980, a State Department of Health investigator visited the site and found a number of the 55 gallon drums on the property. He returned in April with a Virginia State Trooper, Frank H. Lasley, who had a warrant to search the property. The police investigator obtained samples from at least six different drums. The samples were taken to a Richmond laboratory for analysis where William Burrell, a chemist, examined the samples and ran tests on them. He found that the samples contained several organic compounds, including xylene, toluene, and methyl ethyl ketone. Using a Pensky-Martens closed cup tester, he determined that the flash points of the compounds ranged from below 26°F to 92°F.

During this period of time, RCRA was not in effect. However, the activities of Jim's Liquid Waste were a concern of the Virginia Water Control Board and the State Health Department. Lamphier cooperated with the Water Control Board

and in November, 1980, submitted a plan to them for reclamation of the land. The Water Board sent the plan to the Solid Waste Agency and to the State Department of Health, but not for their approval.

Although Lamphier discontinued the hauling of industrial waste in March, 1980, at the request of the Commonwealth, he did continue to store the wastes on his property until June or July of 1981. The effective date for notification by storers of hazardous waste under RCRA was August 19, 1980. Wastes having flash points below 140°F were classified as hazardous under the Act. There is no evidence that the hazardous wastes were removed from the property before the August deadline for notification to the Environmental Protection Agency (EPA). Lamphier did not comply with RCRA's notification requirements as of August 19, 1980, nor did he apply for "interim status" by November 19, 1980, as required by the Act.

In February, 1981, William F. Gilley, Director of Solid Waste Management for the State of Virginia, wrote to Lamphier advising him that RCRA's notification and application requirements applied to him as a storer of hazardous waste. Gilley told Lamphier that he was not in compliance, nor did he have "interim status". Gilley advised Lamphier that he must obtain an identification number before he disposed of the waste.

On February 27, 1981, Lamphier's counsel replied by letter stating that the barrels on the property did not contain hazardous waste. He further stated that the barrels remained on the property at the direction of the State Department of Health, the agency responsible for the waste.

Gilley replied in March. He said that the disposal was Lamphier's responsibility and that Lamphier was required to comply with RCRA and to obtain an identification number

whether he stored the waste or shipped it to a disposal facility. In June, Gilley sent Lamphier a copy of the Virginia Hazardous Waste Management Regulations and a form for reporting under CERCLA. He again reminded Lamphier of the need to comply with RCRA notification requirements.

Lamphier's counsel replied on June 26, 1981, stating that the waste had been disposed of by incineration; therefore, no permit was required.

Gilley requested more information about the incineration. He also wanted to know who had advised the incineration and how it had been determined that the waste was not hazardous. (Whether all the waste had been disposed of is in doubt. At trial, Lamphier testified that he thought he disposed of all of it in the Spring of 1981, by burning, but said there could be a barrel or two left.)

Lamphier's counsel refused to supply the information requested by Gilley, because the attorney learned that the matter had been referred to the State Attorney General.

EDF and CBF mailed notice of intention to file suit under 42 U.S.C. §6972 on July 28, 1981, and suit was filed in this court on September 15, 1981. The state was granted leave to intervene in January, 1982.

## II

The requirements imposed by RCRA on persons treating, storing, or disposing of hazardous waste in Virginia as of November 19, 1980, were as follows:

(1) that they submit a notification to the Environmental Protection Agency (EPA) by August 19, 1980, describing their activities and the type of wastes handled,

(2) that they submit a "part A" application to the Administrator by November 19, 1980, in order to receive an identification number and interim status as a storer of hazardous waste,

(3) that they comply with the application require-

ments governing facilities operating in interim status. A storer or disposer of hazardous wastes must have the following:

- (a) identification number,
- (b) detailed chemical and physical analysis of the wastes,
- (c) site security,
- (d) emergency procedures,
- (e) records,
- (f) plan for safe closure of the facility.

Solid waste, hazardous waste, hazardous waste facility, hazardous waste storage and hazardous waste disposal are all defined by RCRA. Lamphier operated a hazardous waste facility and after the effective date of the regulations, he continued to store and eventually disposed of hazardous wastes without complying with the RCRA regulations.

The defendant has also violated §5.01-01 of the Virginia Hazardous Waste Management Regulation by managing hazardous waste without having obtained an identification number from the Federal EPA and without further complying with RCRA requirements.

In addition to being in violation of state and federal statutes, the defendants' disposal facility is a threat to the safety of the public. According to Gilley's testimony, the property has a potential of contaminating the water and is subject to fires and explosions. It also attracts insects and rodents.

### III

EDF, CBF and the Commonwealth of Virginia are entitled to an injunction demanding that the Lamphiers comply with RCRA requirements, 42 U.S.C. §§6925 and 6930, by notifying EPA of their hazardous waste activities after August 19, 1980, by submitting a permit application for such activities, and by complying with the requirements for hazardous waste facility operating in "interim status."

The state of Virginia is entitled to injunctive relief

from the nuisance created by Jim's Liquid Waste. The state is not certain of the extent of damage done to the environment, nor is the state assured that all the waste has been disposed of. (Lamphier, himself, stated that he may not have burned it all.) The term "nuisance" includes everything that "endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property." United States v. County Board of Arlington County, 487 F. Supp. 137, 143 (E.D.Va. 1979). There is no doubt that Jim's Liquid Waste has the potential to endanger life or health. "There is no requirement that protective measures be limited to actions taken after a crisis has arisen or a catastrophic disaster has struck." McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E. 2d 130, 134, cert denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 101 S. Ct. 361, 66 L.ED. 2d 219 (1980). The state and its agents are authorized to enter onto defendants' property at reasonable times in order to take such samples and make such tests as the Commonwealth deems appropriate. The defendants shall give to the Commonwealth copies of all documents which identify the materials that they have disposed of.

#### IV

The state asks for response costs under 42 U.S.C. §9607(a)(4). Response costs are defined under 42 U.S.C. §9601(25) as the costs for removal, remedy and remedial action. Under 42 U.S.C. §9601(23) and (24), removal and remedial actions are defined as "the cleanup or removal of released hazardous substances from the environment," and actions to prevent, minimize or mitigate damage to the public health or welfare. There is no doubt that the state may have such costs in the future, but they have not incurred them during their investigation. In fact some of the costs that the state has presented occurred prior to the effective date of CERCLA, 42 U.S.C. §9652, which was December 11, 1980, and the greater part of those costs were not incurred in preparation for this litigation.

V

EDF and CBF request reasonable attorneys' fees under 42 U.S.C. §6972(e). They are entitled to those attorneys' fees as shall be determined at a later date.

VI

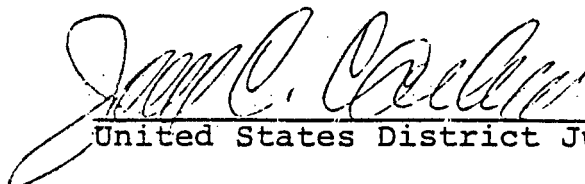
It is, therefore, ORDERED that:

(1) plaintiffs and plaintiff intervenor and their agents are granted an injunction and they are expressly authorized to enter onto defendants' property at reasonable times in order to take such samples and make such tests as the Commonwealth deems appropriate. No bond shall be required;

(2) defendants shall comply with RCRA requirements, 42 U.S.C. §§6925 and 6930, by notifying EPA of their hazardous waste activities after August 19, 1980, by submitting a permit application for such activities, and by complying with the requirements for a hazardous waste facility operating in "interim status";

(3) defendants shall pay attorney fees to Environmental Defense Fund, Inc. and Chesapeake Bay Foundation, Inc., and such fees to be determined by the court on briefs and documents. Plaintiffs' briefs and supporting documents to be submitted by June 1, 1982. Defendants' briefs and supporting documents to be submitted by June 15, 1982.

(4) the Clerk of this Court shall forward certified copies of this Memorandum Opinion and Order to all counsel of record.

  
United States District Judge

May 14, 1982  
Alexandria, Virginia